REPLY TO PETITION FOR WRIT OF CERTIORARI

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 217

DUANE JOHNSON, *Petitioner*

vs.

BENBROOK WATER AND SEWER AUTHORITY, *Respondent*

Repondent's Reply to Petition for Writ of Certiorari to The Supreme Court of Texas and Second Court of Civil Appeals of Texas

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TABLE OF CONTENTS

Page

REPLY TO PETITION FOR WRIT OF CERTIORARI:

JURISDICTION 1

Statement of the Case 2

Questions Presented for Review 7

Argument—Reasons for Refusing Writ:

I. The Authority's action requiring the Developer to pay for all costs of extensions of water and sewer lines within his subdivisions, without reimbursement for the costs thereof, amounts to nothing more than requiring his performance in a contract executed for the mutual benefit of Mr. Duane Johnson and the residents of Benbrook who buy real estate from him. Just because Mr. Johnson is required to perform his end of the contract, for which he receives *quid pro quo*, does not amount to a "taking" either with or without compensation, as prohibited by the Fourteenth Amendment to the United States Constitution 8

II. The Authority's action did not deny the Developer the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States 12

III. The Authority gave full consideration to Petitioner's application for reimbursement of the charges required of him as a Developer of a new area 14

CONCLUSION 16

Certificate of Service 17

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Respondent, Benbrook Water and Sewer Authority, respectfully prays that this Honorable Court refuse to issue a writ of certiorari to review the opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and order of the Supreme Court of Texas refusing to review said opinion upon application for writ of error.

JURISDICTION

This Court has jurisdiction under 28 U.S.C., Sec. 1257 (3), in that Petitioner claims a violation by Respondent of the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States.

The Petitioner's petition was filed within 90 days after the Supreme Court of Texas refused Petitioner's application for writ of error to the Court of Civil Appeals for the Second Supreme Judicial District of Texas as required by 28 U.S.C. Sec 2101 (c), thereby exhausting Petitioner's state remedies.

STATEMENT OF THE CASE

Because of the narrow and slanted viewpoint presented by Petitioner in his statement of the nature of this case, it will be necessary here to go into a more detailed treatise than is usually necessary in a reply of this nature in order for this Honorable Court to be able to see the entire picture. Also, unlike Petitioner's statement, Respondent will reserve its argument for the proper heading hereunder.

As stated by Petitioner, Benbrook Water & Sewer Authority was created by act of the Texas Legislature in 1955. It was created solely as a financing entity to purchase, improve and operate the water system then being operated by the Authority's predecessor, Worth Water Company.

The Respondent is a nonprofit governmental body corporate and politic. Its policies are formulated by a Board of Directors composed of five elected citizens selected from and by the qualified voters residing within the City of Benbrook, Texas, and within the limits of the Authority.

Since its inception in 1955, and during the eleven years of its operation before the trial of this lawsuit, the Authority has been forced to go deeper into debt

with three different bond issues (SF 242), each larger than the last, and at the time of the trial hereof was applying for its fourth and largest bond issue, (SF 233).

It is significant that the Authority's operations are financed entirely out of revenues, and its bond issues were revenue bonds rather than tax bonds. Its only source of revenue are the monthly charges billed to customers for water consumed and for sewerage collection, treatment and disposal. Out of these revenues, the Authority must not only retire its bonded indebtedness at the required rate, but it must also meet the costs of providing and maintaining an adequate water supply and sewerage treatment and disposal facilities.

Immediately after its creation, Benbrook Water & Sewer Authority adopted a policy whereby builders, sub-dividers and developers such as the Petitioner Duane Johnson are required to pay for the entire costs of water and sewer lines within each new development without any reimbursement to the developer for such payments, except in certain instances not in issue here. The Courts below correctly found that although there was an assemblying and recodification of the Authority's policies and procedures in 1965, approximately one year before this case was tried, that there was no significant change in the policies hereunder attacked by the Petitioner. The Courts below have also found that this policy has been strictly adhered to by the Authority's Board of Directors and that there has been no discrimination against the Petitioner in the application of these policies.

Duane Johnson is a speculative developer, (SF 204). He blames the Federal Reserve system for raising the discount rate and causing him to take a loss on some of his lots, (SF 198). Developer purchased a 300-acre tract including the subdivision which is the subject matter of this lawsuit in 1953 for $750.00 per acre, (SF 185-186). Within this subdivision the acreage has been divided into lots containing from one-third to one-half acre each, most of which were selling for $1750.00 each at the time of the trial of this lawsuit, (SF 186-187).

Mr. Johnson admitted that the water and sewer lines installed within his developments increase the value of the property within his development, (SF 190). The portion of the costs of water and sewer facilities borne by the developer under the Authority's policies and procedures, like all of the other costs of improving the raw land such as the costs of curbs, gutters and paving, is prorated over the number of lots within each subdivision, said costs being ultimately recovered from persons who purchase those lots from the Petitioner, (SF 191-194). During the year 1965, Petitioner sold nine lots within the subdivision in question and before the date of trial during 1966 he sold three more; in each case recovering from the respective purchaser of each lot a pro rata costs of all improvements to the raw land, including the costs of water and sewer extensions which he is here attempting to recover again in this lawsuit against Respondent, (SF 193-194). Mr. Johnson anticipates that all 103 lots within the subdivision herein involved will be sold, and in each case he plans to recover the

costs of improving the raw land from the purchaser, (SF 195). Even though the developer has passed the costs of these water and sewer lines along to the purchasers of many of the lots, he does not intend to reimburse these purchasers for their pro rata portions of such recovery, (SF 197-198).

The Petitioner has been developing subdivisions in Benbrook for sixteen years (SF 200), and the Authority's policy with reference to requiring the developer to pay the costs of extending water and sewer lines into their new subdivisions has been in effect since the first policy was outlined by Resolution by the first Board of Directors of August 1, 1955, (SF 298-301). The Authority's present policies and procedures, which are included in the record as Plaintiff's Exhibit No 14, represent no material change in such policy which has existed since the Authority was created, (SF 292).

The Authority's policy with regard to the development of new areas is the same as that customarily followed by other water districts and municipalities, (SF 222-223). As a matter of fact, there is a definite trend in such other districts and municipalities to require developers to participate to a greater extent, not only in the distribution system as required by the Authority, but also in the production and storage facilities, (SF 223). In the formulation of such policies, concepts laid down by other water districts and municipalities in other areas of the State of Texas were followed, (SF 110-112). Experience has shown that water and sewer revenues are sufficient only to pay

for water supply, treatment and storage facilities; and sewerage treatment and disposal facilities, thereby necessitating this trend on the part of water districts and municipalities since World War II toward a no-reimbursement policy regarding developers of new subdivisions, (SF 112-113).

It can not be disputed that the water and sewer lines for which Petitioner is here seeking reimbursement are both asset and liability in nature. These lines are an asset to the property served by them, for which asset Mr. Johnson receives full payment when he sells a lot. They are a liability to Benbrook Water & Sewer Authority in that each new water line installed by Mr. Johnson must be maintained and supplied with water at an adequate pressure. The sewer lines are a liability because the sewerage collected through this network must be treated and disposed of by the Authority.

Over and above the costs of water and sewer lines ultimately paid for by the purchaser of a new home or lot, thes Authority must still provide the funds to pay for sewerage treatment plants, development of water supplies, out-fall sewer collector systems, strengthening and maintenance of the interior portions of both water and sewer systems in order to handle an ever-increasing consumer demand and storage facilities to provide for fire protection and peak demands on water supply, (SF 117-118).

It can not be disputed that no reimbursement for developers would be possible without increasing the Authority's charges to their customers or a tax levied

against the residents and customers of the Authority. This is underscored by the fact that the Authority has gone deeper into debt each year of its operation, even though it makes no profit and its Directors serve for a salary of $10.00 per month each. An increase in rates or additional taxes would, in effect, require the Authority's customers to pay for water and sewer lines installed in new developments, when they have already paid their fair and pro rata share of such costs at the time they purchased their home or lot. This is the thanks Petitioner would show for persons who have purchased real estate from him in the past.

Questions Presented

QUESTIONS PRESENTED FOR REVIEW

If indeed the Petitioner has presented and preserved points of error of the Courts below regarding his constitutional rights under the Fourteenth Amendment of the Constitution of the United States, such questions can be but remotely related to the "questions presented for review" as stated on pages 2 and 3 of Mr. Johnson's petition. Because of the fact that neither question (2) nor question (3) were raised in the Courts below, such questions will not be treated here.

Therefore, the only question here presented for a review before this Honorable Court is that germane to the points 19, 23 and 35 assigned both in the Court of Civil Appeals for the Second Supreme Judicial District of Texas and the Supreme Court of Texas; said

points being summarized as follows.

> "Does the portion of the Respondent's policies and procedures requiring developers to pay the entire costs of the extension of the Authority's water and sewer lines to and through his new subdivisions deprive said Petitioner of his property, 'without due process of law' or deny him 'the equal protection of the laws.' "

ARGUMENT — REASONS FOR REFUSING WRIT

For the sake of continuity of Respondent's argument will be arranged and numbered in reply to that of the Petitioner.

I. *The Authority's action requiring the Developer to pay for all costs of extensions of water and sewer lines within his subdivisions, without reimbursement for the costs thereof, amounts to nothing more than requiring his performance in a contract executed for the mutual benefit of Mr. Duane Johnson and the residents of Benbrook who buy real estate from him. Just because Mr. Johnson is required to perform his end of the contract, for which he receives* quid pro quo, *does not amount to a "taking" either with or without compensation, as prohibited by the Fourteenth Amendment to the United States Constitution.*

The passion and prejudice of Petitioner's argument is illustrated by his repeated use of the term "bureaucrat" and "bureaucracy" when referring to the Authority's employees and actions. He is obviously overlooking the fact that as a governmental body, the

Authority is nothing more nor less than the residents of the City of Benbrook, who are his customers.

When Mr. Johnson went to the office of Benbrook Water & Sewer Authority to make application for the extension of water and sewer lines through his new subdivision, he was admittedly bargaining for a water supply and sewerage collection and treatment facilities. Even Mr. Johnson testified that the availability of these facilities increased the value of his property and enabled him to sell his houses and lots for more than the price he could get without such facilities, (SF 190). It is the availability of this same water supply and sewerage treatment and disposal facilities which is the consideration furnished by the Authority, and which inures to the benefit of Petitioner by enabling him to recover the costs of these water and sewer lines from the persons who purchase property from him. When Mr. Johnson makes application under these same policies requiring him to pay the costs of extending these lines, as he had done for some sixteen years at the time of trial hereof (SF 200), he was deprived of nothing. He was merely purchasing an immediate benefit in the form of increased value to his property. This immediate benefit ultimately inured to the benefit of persons who purchased property within the subdivision in the form of available water and sewer service, and these same persons ultimately pay for the costs of these extensions as a part of the costs of this property.

It is ironic that when Mr. Johnson sues Benbrook Water & Sewer Authority for reimbursement of the

costs of these lines, he is in effect suing his own customers as well as those of other builders, developers and subdividers, on whom the burden of this payment has already been laid when they purchased their property.

The Honorable Fisher T. Denny, Judge of the 96th Judicial District Court in and for Tarrant County, Texas, trial court herein, correctly held that when the Developer made application for the extension of the water and sewer lines, and deposited with the Authority the funds necessary to accomplish such extensions he was not deprived of any of his property without due process of law. The trial court properly held that such payment on the part of the Developer was payment for a valuable service rendered by the Authority —nothing more than the giving of a thing for a thing. This furnishing of water and sewer service to the citizens of Benbrook is necessarily a team undertaking. Developers are not in any way required to partake of this service furnished by the Authority, but if they choose to seek the advantage of this service for their subdivisions they cannot challenge the right of the Authority to impose reasonable conditions upon the furnishing of such services.

It matters not in the slightest who is the owner of the water and sewer lines installed at the Developer's expense. Such water and sewer lines would be worthless without the willingness on the part of the Authority to meet the ever-increasing demand for water supply and sewerage treatment and disposal facilities. The Authority has offered Mr. Johnson the alternative

that he may keep his water and sewer lines and the water and sewer customers he brags about having presented to the Authority on a silver platter. However, he has shunned this offer, apparently being unwilling to spend the horrendous sums of money necessary to meet the ever-increasing demand for water supply and sewerage treatment facilities.

It is very difficult to reply to a brief which assumes a false premise throughout. The false premise in Petitioner's brief is that the Developer is required to install water and sewer lines and then make a present of such installations to the Authority. The fact is that all installations are accomplished in the name and by authority of Benbrook Water & Sewer Authority, and there is never any question as to the ownership thereof. It merely happens that Developers are required for and in consideration of the receipt of water and sewer service for the land they are developing to pay for a portion of such installations.

The Respondent makes no claim to any right to take anyone's property without compensation, and therefore will offer no cases in support of any such right. As the trial court found, and such finding was affirmed by the Texas Intermediate Appellate Court and Texas Supreme Court, the Developer and the Authority each furnish a *quid pro quo* in a contract freely executed for the mutual benefit of both.

II. *The Authority's action did not deny the Developer the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.*

The Respondent is shocked and surprised at the claims made for the first time under the corresponding heading of Petitioner's brief. Such claims not only go outside the record and any claims made in Developer's petition filed in the trial court, but such claims were not even raised in any of the Court's below.

Therefore, for the first time in this Honorable and High Court Mr. Johnson makes the claim that the Authority makes a class distinction between Developers and individual single customers or groups of single customers—a claim which could have been answered quite readily in evidence in the trial court. And because Petitioner has seen fit to go outside the record to raise this question, Respondent will have to go outside the record to answer.

Immediately after its creation by the Texas Legislature and the election of the initial Board of Directors, said Board of Directors on September 6, 1955, passed a Resolution providing Developers within the Benbrok Water & Sewer Authority the same type of reimbursement quoted by Petitioner from Sec. 3 of the Authority's Policies and Procedures (appendix D).

In other words, when an extension of the Authority's existing system by either a single customer or group of customers or a Developer is contemplated to serve intervening property owned by another, whether the extension was accomplished at the request

of those in the single-customer category or a Developer, when the intervening property owners request a tie-on the Authority collects from them their pro rata share of the costs of such extension and reimburses it to the one who financed the extension.

This reimbursement provided for Developers in the first year of the Authority's operation has been followed without exception up to the present time. Ironically, Petitioner has himself received reimbursement under this policy.

The only other denial of "equal protection" claimed by Petitioner on pages 14 and 15 of his brief allude to the fact that on occasion the Authority has used bond funds to make system improvements which have eventually inured to the benefit of one or more Developers.

Admittedly, the Authority's policy with reference to requiring Developers to finance a portion of system extensions into their new subdivision will not dispense with the necessity of financing many system improvements by the Authority out of revenue and bond funds. The City of Benbrook, Texas, was of course not immune to the population explosion which was experienced by most of the rest of our nation. The Authority's Manager and Consulting Engineer testified that it was necessary on occasions to strengthen the Authority's interior systems in order to support outlying growth. They also testified that it has been necessary to replace many of the lines contained in the original purchase from Worth Water Company because of corrosion and other fair wear and tear. It was also neces-

sary approximately one year before the trial hereof to tie together what had initially been two separate water systems in order to provide uniform pressure and consistent water supply throughout the area served.

While it is probably true that if the Authority had not been required to make these expenditures, a part of such expenditures might have fallen on the shoulders of some Developer, not one word of evidence was introduced upon trial hereof to show that any such improvements to the system were at the request of any Developer or was for the purpose of discriminating in favor of any Developer. On the contrary, the only motivation shown was to give better service to the Authority's patrons.

Again, because of the fact that the Authority is not claiming the right to arbitrarily classify and discriminate between classes of persons, no cases will be offered in support of such contention.

III. *The Authority gave full consideration to Petitioner's application for reimbursement of the charges required of him as a Developer of a new area.*

The Respondent is accused on page 21 of Petitioner's brief to have "deliberately ignored the requirement of procedural due process" regarding his application for reimbursement. However, we find once again that the story has been changed to protect the guilty.

Mr. Robert Lee Logan, who was President of the Authority's Board of Directors at the time of the trial

hereof testified that Mr. Johnson's initial request for reimbursement was brought to the attention of the Board of Directors at one of its meetings and said Board gave the request its consideration at a meeting to which Mr. Johnson was invited but failed to appear. After such consideration, the Board denied Mr. Johnson's request (SF 310-312).

The question of procedural due process is obviously only material in cases where the offended party is faced with the "substantial evidence rule" in his appeal to the Courts. In this case, the Petitioner was given a full, fair and complete hearing in the trial court and Court of Civil Appeals, and the action of these Courts was approved by the Supreme Court of Texas by refusing to grant Petitioner's application for writ of error.

It has been pointed out on many occasions to the Petitioner that all meetings of the Authority's Board of Directors are open to the public, and he has on many occasions attended such meetings.

Here again, in this section of his brief, Petitioner assumes a taking "from a citizen through administrative proceedings" and cites authorities for the proposition that such taking cannot be accomplished without a hearing. The Respondent does not argue with this proposition, but merely states that no such taking has befallen Mr. Johnson. It must be here repeated that the trial court correctly held that no such taking was involved in this case and that Mr. Johnson had been afforded full substantive and procedural due process, notwithstanding his claims to the contrary.

Mr. Johnson has been merely pinched by the shoe which requires him to perform his part of a contract bilateral in nature.

CONCLUSION

The Petitioner in his brief cited many authorities for legal propositions as dear to our way of life as are marriage, motherhood and the church. Obviously the Respondent will not undertake any attempt to besmirch these principles.

The fact is that the trial court held that the matters complained of so vociferously by Petitioner just did not in fact occur. Under the Authority's policies, the Developer does not obtain and then be deprived of the extensions which are the subject matter of this lawsuit. He is merely required to pay an amount of money equivalent to the costs of a portion of these installations as a condition precedent, and in payment for the Authority's water and sewer service, upon his application for such service for a new area being developed by him.

He has already admitted in his testimony that he received for this payment a corresponding increase in value of the property within his development, (SF 190). Therefore, he has admittedly received his *quid pro quo*.

The trial court correctly held that the Authority could require such payment from Developers, and that the requirement of such payment was not an unconstitutional taking without compensation, and

amounted to no denial to Petitioner of equal protection of the laws. The trial court and Court of Civil Appeals further correctly held that the Petitioner was not denied procedural due process of law.

The Supreme Court of Texas did not err in refusing to issue writ of error on the grounds that the Courts below committed no reversible error.

WHEREFORE, writ of certiorari as requested in Developer's Petition should be denied.

Respectfully submitted,

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By: Cue Lipscomb
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CERTIFICATE OF SERVICE

Copies of this Reply to Petition for Writ of Certiorari have been served as provided by Rule 33 by personal delivery to Counsel or a Clerk in the office of Mr. Henry E. Kerry, 220 Fort Worth Club Building, Fort Worth, Texas, this 3 day of August, 1968.

Cue Lipscomb
Of Counsel for Respondent